

Chapter 11

The Citizen as Beneficiary of Government Assistance

Two factors led the Privacy Protection Study Commission to study the record-keeping practices of public assistance and social services¹ agencies.² First, the number of Americans who receive government assistance or service in some form is enormous. Second, the process of administering the welfare system³ depends on the collection and use of personal information. The collaboration between the Federal government and the various States in developing the present welfare system has provided a complex set of eligibility criteria and formulae for determining the level of benefits to which an individual is entitled. Applying them demands a great deal of personal information. No one could deny that the welfare system is "intrusive," if one test of intrusiveness is the volume, detail, and sensitivity of the information collected about clients⁴ of the system.

Perhaps because the intrusive nature of the system is so widely acknowledged, Congress has, since the 1930's, recognized the need to provide some protection from unfairness in the use of records about clients of federally assisted welfare programs. Federal law regarding record keeping does not, however, encompass all the basic issues of fairness identified by the Commission. In addition, although the largest federally assisted welfare

¹ "Public assistance and social services" include, for the Commission's purposes, cash or in-kind benefits (including, for example, food coupons, medical services, day care, counseling, alcohol and drug abuse treatment, employment training and housing) subsidized by government funding and provided to individuals or families on the basis of financial need. The term does not include benefits provided under an insurance scheme, such as Old-Age, Survivors and Disability Benefits, Medicare, or Unemployment Insurance. This chapter, and the recommendations contained herein, do not apply to any public assistance and social services program that is federally administered (such as Supplemental Security Income) and thus subject to the Privacy Act of 1974.

² "Agencies" include, for the Commission's purposes, any public or private organization administering, supervising the administration of, or delivering services to individuals or families pursuant to, a public assistance or social services program. This definition would include, for example, private service organizations providing services to clients under Title XX of the Social Security Act. It does not include medical-care providers rendering medical assistance to Medicaid and Title XX recipients, except insofar as these institutions determine eligibility for the Medicaid and Title XX programs. Recommendations affecting the record-keeping practices of medical-care providers are found in Chapter 7.

³ "Welfare system" and "welfare," as used in this chapter, refer to the entire complex of public assistance and social services programs.

⁴ The term "client" will be used throughout this chapter to refer to both applicants and recipients of the programs under discussion.

programs are required by Federal law to maintain some standards of fairness, many are not required to take into account even minimal considerations of fairness in their record keeping. Moreover, programs funded only by a State or local government are often constrained by no laws or standards for protecting the personal privacy interests of clients.

Two main considerations guided the Commission in its task of analyzing current Federal policy with respect to the practices of agencies providing public assistance and social services. The first consideration was the principle that individuals compelled by necessity to seek assistance and services from programs funded by government agencies should not have to renounce all claim to personal privacy in exchange for the benefits they seek. In the Commission's view, welfare clients have as much right to respect and dignity as other groups and should be as carefully protected from unfairness stemming from record keeping as are consumers of insurance, medical care, and credit.

Second was the need to maximize the strengths and minimize the weaknesses of a welfare system which divides responsibilities—for funding and for administration—among Federal, State, and local government agencies. Although its great spending power gives the Federal government a powerful regulatory tool, when the Federal government lacks sufficient knowledge of, or sensitivity to, local circumstances, some discretion should appropriately be left to the States and localities.

While this report was in preparation, the Department of Health, Education, and Welfare and other government agencies and private organizations were exploring various welfare reform alternatives. Although the shape reform will take is not yet clear, safeguards against unfairness to individuals will always be needed, and thus review of record-keeping policies and practices is timely. The Commission hopes this report will help policy makers both in modifying record-keeping practices under the present welfare system and in formulating policies to protect the privacy rights of clients under whatever system may emerge. In particular, in the event that the administration of certain welfare programs is assumed by the Federal government, this chapter may help concerned parties to determine whether special protections should be provided for records about welfare clients that supplement those provided in the Privacy Act of 1974.

METHOD OF STUDY AND ANALYSIS

There are dozens of federally assisted programs for providing help to the needy, and unnumbered assistance and services programs funded by State and local governments. Since in-depth study of all these programs was impossible, the Commission confined its detailed examination to the record-keeping policies applicable to agencies administering the four largest federally assisted programs in terms of dollars and clients. These programs are Aid to Families with Dependent Children, Medicaid, Title XX Social Services, and Food Stamps. In addition, the Commission examined the Child Support Enforcement Program. This program seemed to merit the

Commission's attention because it has been particularly controversial, some groups seeing it as entailing abrogation of absent parents' privacy interests.

The Commission did not study in detail the public assistance and social services programs administered directly by the Federal government rather than by States and localities, and therefore makes no recommendations regarding them. The Privacy Act of 1974 already covers such programs, including Supplemental Security Income (SSI) for the aged, blind, and disabled and cash benefits for veterans with disabilities not related to military service.

The Commission's study of the four specified programs included a review of pertinent Federal statutes and regulations, meetings with Federal, State, and local officials and representatives of private organizations and public interest groups, and the services of an expert consultant with many years of experience in the welfare field. After completing the initial study, the Commission formulated a set of draft recommendations which were published in the *Federal Register*⁵ and otherwise made available for public comment. Three days of public hearings on the recommendations were held in January, 1977, and, in addition, the Commission has received more than 90 written comments regarding them. Although the Commission could not make detailed studies of record keeping by the welfare agencies of all fifty States, the written comments and oral and written testimony offered at the hearings yielded rich and valuable information regarding current practice in these agencies.

The Commission's inability to make a detailed study of the record-keeping policies applicable to all of the various federally funded assistance and services programs reflects a central problem: present law provides no clear, consistent set of policies applicable to record keeping in all federally assisted welfare programs. Each of the various statutes establishing a program either prescribes its own policy or is silent on the subject. Anyone who tries to administer public assistance and social services programs established by different Federal statutes may well encounter inconsistent, and perhaps incompatible, statutes and regulations governing record keeping. It is doubtful that anyone has, or, without very substantial resources, could have, a clear picture of how the laws governing this multitude of programs interrelate. In short, the Commission found that the descriptive word for record-keeping policy in this area is "complex." Thus, a primary Commission goal was to find ways of simplifying the complexity.

PROGRAM OVERVIEWS

The public assistance and social services programs studied by the Commission serve specific client populations. Each program operates within organizational and funding structures defined by Federal statute and regulations and, in some cases, by State and local statutes and regulations. Administrative responsibilities are delegated to Federal, State, and local government units as the laws require. The following sections briefly identify

⁵ 41 *Federal Register* pp.43724-27, (December 8, 1976).

the clients served and the basic administrative characteristics of the programs studied.

Aid to Families with Dependent Children

Title IV-A of the Social Security Act authorizes payments to States for the provision of financial assistance to needy families with dependent children. The Act defines dependent children as those children under 18 (or in the case of children attending school, under 21) who have been deprived of parental support or care by reason of the death, continued absence from home, physical or mental incapacity, or, under certain conditions, the unemployment of a parent. Within the broad requirements of the Social Security Act, a State has considerable latitude in defining the categories of the needy who will be served by the program in that State (e.g., whether or not to include families with an unemployed parent), in applying the eligibility criteria, and in determining what level of assistance will be provided to those eligible.

Aid to Families with Dependent Children (AFDC) provides financial assistance to help cover the costs of food, shelter, clothing, and other basic living costs. Emergency assistance and funds to support certain children in foster homes and institutions may also be provided. To supplement this assistance, an AFDC recipient is also eligible for assistance under the Medicaid, Food Stamp, and Title XX Social Services programs, and may also qualify for other forms of public assistance and social services.

Administrative and funding responsibilities for AFDC are shared by the Federal government and State and local governments. Program administration is overseen by the Social Security Administration of the Department of Health, Education, and Welfare (DHEW).⁶ A State may either administer the program or supervise its administration by local governments. Federal funds (ranging from 50 percent to 65 percent of the total cost) help to finance assistance payments to recipients and may also be used to help cover administrative costs at the State and local level. States must share in the cost of the program and, in some but not all cases, local governments also contribute.

Medicaid

The Medicaid program authorized by Title XIX of the Social Security Act provides Federal funds to States for use in paying for medical services rendered to both the categorically needy and the medically needy. The categorically needy are those receiving assistance under the AFDC or Supplemental Security Income programs. The medically needy are those who meet all criteria for federally funded cash assistance, except the income criterion, and who lack the income and resources to meet the costs of

⁶ Prior to the March 1977 reorganization of the Department of Health, Education, and Welfare, administration of the AFDC program was supervised by the Assistance Payments Administration of the Social and Rehabilitation Service.

necessary medical care and services. Their income may not exceed 133-1/3 percent of the State's cash assistance standard.

At minimum, a State must provide categorically needy individuals with:

- inpatient hospital services;
- outpatient hospital services;
- other laboratory and x-ray services;
- skilled nursing facility services for individuals 21 years of age or older;
- early and periodic screening and diagnosis of individuals under 21 to discover and treat mental and physical defects;
- family planning services and supplies; and
- physician's services.

The State may use the Federal funds in providing the medically needy with the above services or with other services which qualify for Federal funding under the Act. The services are rendered to recipients by qualified medical-care providers who are then reimbursed by the State.

The Health Care Financing Administration of the Department of Health, Education, and Welfare⁷ oversees the administration of the Medicaid program. A State agency is responsible for either the administration of the program or the supervision of its administration by local government units. The designated State agency may, however, contract with other State agencies for performance of specified functions such as utilization review. States may also contract with private organizations to process claims, to act as the State's fiscal agent, or to develop and operate its Medicaid Management Information System, a mechanized claims-processing system for which special Federal funding is available.

The Federal share of Medicaid program costs is calculated according to a formula based on the State's per capita income in relation to national per capita income. The Federal share ranges from a low of 50 percent in many States to a high of 78 percent in one. States or localities, or both, provide the remaining funds.

Social Services

Title XX of the Social Security Act authorizes Federal grants to States for the provision of social services to recipients of public assistance under the AFDC or Supplemental Security Income programs and to other low-income persons who do not qualify for public assistance but whose income does not exceed 115 percent of the median income of a family of four in the State. The grants provided under Title XX are to be used for five specified purposes:

1. achieving or maintaining economic self-support to prevent, reduce, or eliminate dependency [of eligible clients];

⁷ The Medical Services Administration of the Social and Rehabilitation Service, DHEW, supervised Medicaid administration prior to the March 1977 DHEW reorganization.

2. achieving or maintaining self-sufficiency, including reduction or prevention of dependency;
3. preventing or remedying neglect, abuse, or exploitation of children and adults unable to protect their own interests, or preserving, rehabilitating, or reuniting families;
4. preventing or reducing inappropriate institutional care by providing for community-based care, home-based care, or other less intensive forms of care; and
5. securing referral or admission for institutional care when other forms of care are not appropriate, or providing services to individuals in institutions.

Among the many services Title XX cites as appropriate to these five purposes are: child care services; services related to the management and maintenance of the home; day care services for adults; employment services; information, referral, and counseling services; health support services; appropriate combinations of services designed to meet the special needs of: (1) children; (2) aged, mentally retarded, blind, emotionally disturbed and physically handicapped individuals; and (3) alcoholics and drug addicts.

A single agency of each State administers or supervises the administration of the services programs of Title XX under the oversight of the Office of Human Development, DHEW.⁸ In providing services to those eligible, a State may elect to use State facilities and personnel, to purchase services from private providers, or to use a combination of these alternatives. The State may also delegate certain administrative responsibilities to providers. For example, responsibility for determining an applicant's eligibility for a Title XX service may be delegated to the provider.

Federal funds totaling approximately \$2.7 billion a year are available under Title XX. They can be used to reimburse States for 75 percent of the cost of social services, and in the case of family planning services, for 90 percent of the cost.

Food Stamps

The Food Stamp Program permits low-income households to buy coupons for less than the coupons are worth in exchange for food at federally certified food stores. Families receiving cash assistance under the AFDC or SSI programs are eligible for food stamps, as are those whose income falls below levels established by the Federal government.

State or local welfare offices administer the program under the supervision of the Food and Nutrition Service of the Department of Agriculture. The Department of Agriculture pays 100 percent of the cost of the food stamp coupons and 50 percent of the administrative costs incurred by States and localities.

⁸ Before the March 1977 reorganization of the Department of Health, Education, and Welfare, the administration of Title XX programs was overseen by the Public Services Administration in the Social and Rehabilitation Service.

Programs Not Studied by the Commission

As noted above, the Commission could not make a detailed study of all the public assistance and social services programs funded by Federal, State, and local governments, and it made no attempt to study social services programs administered by private organizations that do not receive any government funding. Examples of the different types of government programs the Commission did not study are cited here to lend perspective on the universe of public assistance and social services programs.

Besides the four major programs studied by the Commission, the Federal government funds a great many categorical grant programs that provide assistance and services to the needy. Illustrative of these are:

- nutrition programs administered under Department of Agriculture supervision, such as the School Breakfast and School Lunch Programs, the Special Supplemental Food Program for Women, Infants and Children, and the Summer Food Service Program;
- health programs administered under the supervision of the Department of Health, Education, and Welfare, such as Family Planning Projects, Maternal and Child Health Services, Drug and Alcohol Abuse Community Services Programs, and Community Mental Health Programs;
- education programs under the auspices of DHEW, including Follow Through and Vocational Education;
- human development programs administered under the supervision of DHEW, including Head Start, Runaway Youth, Vocational Rehabilitation, and Special Programs for the Aging;
- housing programs funded by the Department of Housing and Urban Development, such as public housing and rent supplement programs; and
- employment programs of the Department of Labor, such as the Work Incentive Program, Job Corps, and Comprehensive Employment and Training Programs.

States also fund cash assistance and social services programs, especially to meet needs in areas where Federal financial assistance has not been made available. The most common of these State programs, usually called "general assistance," makes cash available to the needy who are not eligible for Federal cash assistance under AFDC or SSI, such as young, single individuals and young couples with no children. States may also fund special purpose programs to supplement Federal programs. Examples of these in California are the State's Emergency Loan Programs and Special Circumstances Program.

Obviously, the record-keeping issues inherent in administering the AFDC, Medicaid, Social Services, and Food Stamp programs also arise in these other programs. Eligibility for these programs is generally based on financial need. Those seeking assistance under any of the programs must

apply for it and submit to the prescribed methods of verifying the information they supply. Inevitably, a record is created to document the relationship between the client and the agency administering the program. Therefore, as explained in more detail below, the Commission believes that the information safeguards recommended for the four major programs which the Commission studied in detail should be required of the other programs as well.

PRINCIPAL FINDINGS AND CONCLUSIONS

The basic philosophy of any system of government is reflected in its welfare system and in the way policy regarding the welfare system evolves. In a federal system, responsibilities for governing are divided between national and state governments. The welfare system of the United States is a product of our federal system of government, and methods of determining welfare policy and the policy itself must reflect this reality.

Historically, "poor relief" was a local responsibility. During the Great Depression of the 1930's, the tidal wave of unemployed quickly overwhelmed community resources, throwing the burden of supporting them on the States. When the States, in turn, found themselves helpless against the floodtide, the Federal government stepped in. Since the 1930's, the funding of welfare has been a shared responsibility of Federal, State, and in some cases local, governments; administrative responsibility for alleviating the plight of the needy, however, has remained with the States, even though the Federal government has assumed an ever larger share of responsibility for financing the benefits and the cost of administering them.

The States are not, however, free to administer welfare programs as they see fit. Acceptance of Federal funds carries with it the obligation to adhere to Federal standards and requirements. The extent of Federal constraint on the States has fluctuated over the years and varies from program to program, in record keeping as in other aspects of administration.

When Federal law is silent on a record-keeping activity, States retain the discretion to establish their own policies and practices within the limits established by the Constitution. To the extent that the Federal government has chosen to regulate the record keeping of agencies administering federally assisted programs, the minimum requirements for acceptable practices are set forth in Federal statute and regulation. These, or more stringent, requirements must be included in State statutes, regulations, or plans. The result is that welfare record keeping reflects a medley of practices prescribed by Federal statutes and regulations in some areas, by State laws in others, by a combination of the two, or, in some cases, by no formal policy at all.

A comprehensive policy to guide all the record-keeping activities of welfare agencies has never been formulated by the Federal government. A few States have recently enacted laws that deal comprehensively with fair information practice, but the laws are general in scope, applicable to all State records. Some federally assisted programs must conform to Federal requirements, such as those regarding client access to records, contents of a

case file, and permissible disclosures of records, while others—either through oversight or deliberate omission—need not. For the great bulk of federally assisted programs, Federal law has not yet prescribed fair practice regarding such factors as the accuracy, timeliness, completeness, and relevance of information used, and the ability of a client to contest erroneous information. In the case of programs funded solely by State or local governments, the administrators, however attentive they may be to professional ethics, often receive little direction from State legislatures in setting record-keeping policy.

It is against this background that the Commission's general findings must be understood. The Commission has evaluated the extent to which existing law on record keeping is faithful to the principles of fair information practice described earlier in this report. Specific recommendations (see below) focus on the deficiencies of existing policy; the following general findings help put them into perspective.

First, the Commission could find no general, overall policy on public assistance and social services record keeping. In the few programs that address and attempt to control practices from which unfairness to clients can flow, attention has concentrated on some controls—most notably constraints on disclosures of records—while other sources of unfairness have been largely ignored. Failure to define general policy leaves the way open for unfair record-keeping practices.

Second, the Commission finds that the lack of a general policy creates problems within an agency. Even where law has been developed to regulate the record-keeping practices of the federally assisted programs, the resolutions arrived at are not necessarily consistent from one program to another. For example, the AFDC, Medicaid, Social Services, and Food Stamp programs are each subject to somewhat different restrictions on disclosure of client records to third parties. Nor are the rules regarding client access to a case file the same in the Food Stamp program as in the AFDC program. Such policy inconsistencies often confuse those administering a program, as well as the program's clients, and may create unnecessary administrative costs. The confusion is compounded when a private services agency receives funds under several federally assisted programs. Such a private agency may find it all but impossible to keep its records so that they meet the requirements of the different funding sources.

Third, the Commission finds that lack of a general policy creates great problems in the exchange of information among and within agencies. Federal record-keeping policy fails to take full account of the interrelationship in administration of all of the federally assisted programs. Again, this problem is especially acute in the area of policy that defines and limits the range of permissible disclosures of a program's records. Information about Medicaid and Food Stamp clients, for instance, may not be disclosed for purposes other than the administration of the program for which it was collected. Yet one worker in a State or local welfare agency may have responsibilities for administering not only these two programs, but others, such as AFDC and Social Services, as well. It may be impractical for the agency to segregate records about the client as a Medicaid or Food Stamp

recipient from those about the same client as an AFDC or Social Services client.

Fourth, the Commission finds uncertainty about the extent to which the Federal government should dictate the record-keeping practices of State and local welfare agencies. Federal law in some areas clearly directs the practices to be followed, while in other equally crucial areas, Federal law is silent, leaving the States with wide discretion in formulating their own policies. Disclosure policy, for example, is clearly specified in Federal law, whereas the States are left to decide what practices are permissible in verifying information.

Fifth, the Commission finds weak oversight of record-keeping practices, even where requirements are quite clear. Federal agencies like the Departments of Agriculture and Health, Education, and Welfare apparently lack the resources to monitor State practices adequately, so that a State which ignores or circumvents their regulations can probably do so with impunity. For example, despite a clear DHEW regulation permitting an AFDC client access to his case file prior to a hearing, the Commission found substantial evidence that some States deny this right.

Sixth, the Commission finds that even when State policy incorporates Federal requirements, the workers at the State and local level sometimes fail to translate policy into practice. Factors which contribute to these failures include the complexity of the laws and frequent changes in requirements, which increase the work load to no purpose and make it difficult for workers to know what is required of them. Complexity and frequent change in requirements are not the exclusive prerogative of Federal legislators; State legislators also contribute.

Finally, the manner in which Federal spending power has been exercised and the inaction of the States have meant that cash assistance and social services programs funded by State and local governments may be subject to record-keeping requirements that are different from those applicable to federally assisted programs or, in some cases, to no requirements at all. This is true even when such programs are administered by the same State agency responsible for administering federally assisted programs. This means that the privacy interests of clients of these programs may be wholly unprotected and that flows of information between federally assisted programs and those financed through other means are subject to no coherent policy.

GENERAL RECOMMENDATIONS

The above findings should make clear the advantages of establishing a comprehensible and generally applicable record-keeping policy to guide public assistance and social services programs at all levels. Such a policy would have to be enacted by the Congress, spelled out in Federal regulations, and overseen by Federal agencies. To the large and growing number of citizens who perceive welfare as a national problem, this is the obvious approach. Since most of the money for welfare comes from the Federal government, it has a strong responsibility for directing how the

programs will be carried out. Furthermore, the Federal government, having created a patchwork of uncoordinated public assistance and social services programs and equipping them with inconsistent regulations, can fairly be charged with responsibility for bringing the record keeping of at least the federally assisted programs into alignment, and for assuring the fair use of records about their clients.

On the other hand, standardization always carries a price tag. It is difficult for any national policy to take full account of the particular needs of each of the States and the variety of arrangements the States have devised for providing public assistance and social services. Furthermore, a balance must always be struck between privacy and other goals and values, and the trade-off satisfactory to the citizens of one area may or may not be acceptable to the citizens of another area. The controversy over how private providers report individually identifiable data about Title XX clients to State agencies illustrates this problem.⁹ An added cost is that standardization inevitably stifles innovation.

After considering all of these arguments, the Commission concluded that the need for a Federal policy on record keeping by public assistance and social services agencies overwhelmingly outweighs the potential drawbacks. These drawbacks can be minimized by leaving the States significant latitude in formulating the specifics of a record-keeping policy within the guidelines imposed by Federal law.

Accordingly, the Commission recommends:

Recommendation (1):

- (a) **That the Congress enact a statute that requires each State, as a condition of the receipt of Federal financial assistance for public assistance and social services programs, to enact a fair information practice statute applicable to records about public assistance and social services clients of any agency administering or supervising the administration of any federally assisted public assistance or social services program (the requirements of the State statute are described below);**
- (b) **That Congress give a State two full State legislative sessions to enact the required statute before it is considered not to be in compliance with Federal law;**

⁹ A controversy arose when private providers under contract with State agencies to provide Title XX services objected to a requirement that they report individually identifiable client data to State agencies. The information was needed by State agencies to report to DHEW an "unduplicated count" of Title XX recipients. Some provider agencies, especially those providing legal assistance and mental health services, protested that compliance with such a reporting requirement would breach the confidentiality of their relationship with their clients, deter individuals from seeking needed services, and give the State agency the capability to construct a Title XX client "data bank" which could be used to the detriment of clients. Although this controversy reached crisis proportions in some States, it simply never became a significant issue in others. Although DHEW responded by making it possible for States to report an estimated, rather than actual, unduplicated count, some State agencies would like to continue to collect individually identifiable data for their own planning and evaluation purposes.

- (c) That the Congress specify in the statute the general principles of the fair information practice policy, leaving to the States some discretion to tailor specific means of implementing the principles to their own needs, where appropriate;
- (d) That the Congress make the Secretary of Health, Education, and Welfare responsible for determining that each State has enacted the required State statute and that it has the characteristics required by Federal law. The Secretary should consult with the heads of other Federal agencies funding public assistance and social services programs in carrying out this responsibility;
- (e) That every Federal agency responsible for overseeing the administration of a public assistance or social services program be required by Federal statute to review State compliance with the record-keeping requirements set forth in Federal and State statute;
- (f) That the process that States use for formulating and enacting specific fair information practice requirements provide ample opportunity for public participation, including public hearings; and
- (g) That appropriate sanctions and remedies, at the Federal and State level, be available to deal with violations of the statutorily prescribed requirements.

Adoption of this recommendation would achieve several ends. It would:

- resolve most of the problems created by inconsistencies in Federal policy regarding the records of various programs while at the same time allowing the States a measure of flexibility in implementing the policy;
- provide the same protections for all client records maintained by agencies that receive Federal financial assistance, including their records about clients of programs that are not federally assisted;
- supersede with a single Federal and a single State statute the myriad laws that currently govern record-keeping practices, thereby substantially reducing the complexity which renders such laws ineffective;
- remove the temptation for agencies to diversify their record-keeping practices in incompatible directions by embodying a uniform general policy in statute;
- strengthen oversight by Federal agencies; and
- provide legal sanctions and remedies to deal with violations.¹⁰

Simplicity and comprehensiveness are the goals of these general recommendations. Comments submitted to the Commission by many public

¹⁰ See Chapter 10 for a discussion of the need for Federal sanctions that are proportionate to the seriousness of State non-compliance.

agencies and private organizations attest that these goals are urgently desired. As the representative of one welfare agency noted in testimony before the Commission:

We strongly urge the adoption of the same standards for all the programs under consideration. It is sufficiently difficult to administer complex and varied programs, without having to be constrained by different standards for different programs. Not only is it confusing to staff but to recipients who begin to view us as a "schizophrenic" agency.¹¹

States will need a reasonable period of time—two legislative sessions—to formulate the recommended statute. Only after that time would a State not be in compliance with Federal law, if the Commission's recommendation were adopted.

Because of the central role of the Department of Health, Education, and Welfare in funding and overseeing the administration of public assistance and social services programs, the Commission considers the HEW Secretary the appropriate person to assume primary responsibility for evaluating State compliance in enacting the recommended statute with, of course, the benefit of consultation with heads of other Federal agencies to assure coordination and understanding.

The Commission further believes that record keeping by government agencies and private providers that do not receive any Federal funding should also be subject to the fairness standards set forth for agencies receiving some Federal assistance, but the Commission acknowledges the fact that the Federal government cannot impose such standards on them. Therefore, the Commission recommends:

Recommendation (2):

That every State enact a statute applying the fair information practices required of agencies receiving Federal public assistance and social services funds to records of cash assistance and social services agencies that do not receive any Federal funding.

SPECIFIC RECOMMENDATIONS

This section discusses the policies underlying the Commission's specific recommendations for a State fair information practice statute. Some of the recommended provisions simply embody present practice. They would serve the purpose of making such practice a statutory requirement. Others broaden the rights already accorded to clients. The remainder prescribe new record-keeping requirements. All of these recommendations are framed to apply to *all* client records maintained by agencies that receive

¹¹ Written statement of the Middlesex County, New Jersey, Welfare Board, *Public Assistance and Social Services Record Keeping*, Hearings before the Privacy Protection Study Commission, January 12, 1977, p. 12, (hereinafter cited as Public Assistance and Social Services Hearings).

any Federal funds, not just to those records of an agency about clients for whom Federal assistance has been secured.

For the Commission's specific recommendations to take effect, two legislative steps would be required: (1) enactment of a Federal statute requiring that a State, as a condition of receiving Federal financial assistance for any public assistance and social services program, adopt a statute mandating certain minimum record keeping requirements; and (2) enactment of such a statute by the State.

Intrusiveness

Only details about the circumstances of a particular applicant can show whether he or she qualifies for help under any public assistance or social services program, and additional data about an eligible applicant inevitably accumulate as long as he or she receives assistance or services. When the eligibility requirements are complex, and verification requirements stringent, as they are in many welfare programs, the information collected about applicants for, and recipients of, welfare becomes very detailed indeed. In some areas of the country, for example, a worker visits clients' homes to verify their statements. These home visits, although made by prior appointment, give the agency an opportunity to collect more detailed personal information than the client might be willing to disclose. Furthermore, a welfare agency striving conscientiously to provide as much help as it can to its clients has a strong incentive to delve deeply into a family's problems in order to make sure all members of the family are getting all the help to which they are entitled.

Such efforts produce detailed records about virtually all aspects of a welfare family's personal life—its finances, possessions, habits, sexual relationships, need for family planning services, physical and mental health problems, education, prior employment, dependence on alcohol and drugs, and utilization of medical services. Welfare agencies are more likely than the other agencies and organizations studied by the Commission to have the makings of a profile covering every aspect of client families' lives.

The ability of a welfare agency to collect such sensitive information imposes the obligation to control its records with exceptional care, as explained below. In addition, the Commission was prompted to consider the need for constraints on the power of a welfare agency to collect and record some kinds of information.

Criticism of welfare agencies often focuses on the kinds of questions asked regarding eligibility and resources. Eligibility criteria, and consequently the questions asked on application forms, differ from State to State. Even when information collected for eligibility determination is clearly relevant to that purpose, some critics nonetheless oppose its collection on the grounds that it is so sensitive that its collection constitutes an unwarranted invasion of personal privacy.

In the welfare area—unlike some of the other areas the Commission studied—a disgruntled client cannot choose among a number of different agencies with different eligibility criteria from which to seek assistance or

services. Only one State agency can serve him. Thus, one might conclude that there is no way in which an individual can limit the degree of intrusion to which he must submit in order to get public assistance and social services.

To a certain extent this is true. A client, acting independently, is not likely to be able to exercise much control over a welfare agency's probing into the details of his personal life. But clients who feel the intrusion goes too far are not totally without recourse.

There are now two ways of settling disputes between clients and a welfare agency over the appropriateness of using particular items of information in a determination or redetermination of eligibility. If a client claims that a denial of benefits was based on irrelevant information, he can demand a hearing to contest the basis of the decision. Because eligibility criteria are set out in State statutes, regulations, and plans, they provide some objective standards against which the relevance of the disputed information can be assessed that are independent of the whim of an agency or worker.

Because eligibility criteria are usually determined either by State legislatures or through some sort of rule-making process, there is a second recourse for clients, or alternatively, organizations of clients or others acting in their interests, and that is to seek amendment of the official eligibility criteria. The need to ask certain questions can be removed if the eligibility criteria are changed. Louisiana, for example, now specifies that the value of musical instruments and jewelry of a sentimental value will not be taken into account in its assets tests. Although the exception may not have been prompted by concern about intrusiveness, the example illustrates that this method of limiting the collection of information is feasible.

The question of intrusiveness may also arise when an agency believes that a client is entitled to services other than the ones for which he has applied. After a family is found eligible for AFDC, for example, the AFDC worker may try to help the members of the family determine what other services they need, and then refer them to appropriate service providers. In some instances, referral to another agency is mandatory. An eligible AFDC client must be referred to the Work Incentive Program (WIN), and thus has no choice but to acquiesce in the exploration of factors relevant to WIN status. But where the acceptance of services is voluntary, an agency is hardly justified in demanding more information than the individual client or family is willing to divulge.

The exploration by agencies of factors relating to possible needs of a family that are not being met is wholly laudable. Unless participation in another program is a condition of eligibility under the program for which the client has initially applied, however, the Commission believes that clients of a public assistance or social services program should not be *required*, or *coerced*, to divulge information about either need or potential eligibility for other assistance or services programs. The Commission has therefore concluded in its recommendation on "Notification of Rights" (see below) that a client be told, at the time information is requested of him, whether he must divulge the information as a condition of receiving benefits, or whether its disclosure is voluntary.

Fairness

FAIRNESS IN COLLECTION

In making determinations about a client's initial or continuing entitlement to benefits, an agency may contact third-party sources (e.g., banks, schools, neighbors, State agencies) in order to verify information the client has supplied. The extent to which such collateral verification is sought, and the methods by which it is obtained, vary among States and programs, among agencies, and even among workers responsible for determining a client's eligibility in a single locality.

Federal statutes and regulations currently give agencies little guidance with respect to the collateral verification process. Food Stamp regulations, for example, require verification of income, and also of eligibility factors if the information the applicant has provided is unclear, inconsistent, incomplete, or otherwise raises doubts about eligibility. [7 C.F.R. 271.4(a)(2)(iii)] To supplement these directions, the Department of Agriculture prescribes the "prudent person rule" which advises eligibility workers to use reasonable judgment in deciding what information supplied by the applicant should be verified with other sources.

In 1969, the Social and Rehabilitation Service of DHEW promulgated regulations outlining acceptable verification procedures for the AFDC, Medicaid, and pre-Title XX social services programs.¹² The regulations provided that verification be limited to that which is reasonably necessary to ensure the legality of expenditures under a program and required the agency to rely on the client as the primary source of information in determining eligibility. The agency could, however, help the client obtain information or obtain information for a client who could not get it himself without help (e.g., because of mental or physical impairment). If collateral contacts were necessary, the regulations required the agency to explain to the client what information would be needed, why it was needed, and how it would be used. The agency then had to obtain the client's consent to the contact. If the information supplied by the applicant or recipient could not support an eligibility decision, the agency had to explain what else was needed, and try again to get it from the client. If the client could not supply the necessary information and refused permission for the agency to contact a source, assistance could be denied or terminated.

These regulations were repealed in 1973, apparently to give States greater flexibility in developing their own collateral verification processes. The large number of overpayments to clients and payments to ineligible that had been uncovered made greater flexibility seem desirable.

The Commission recognizes that collateral verification can be necessary, especially when inconsistencies or vagueness in the information received from an applicant or recipient, or inadequate records, raise doubt about eligibility. It also believes that State and local agencies unquestionably need a degree of flexibility in determining when verification is

¹² Prior to the enactment of Title XX, Federal funding for State administered social services was available under Titles IV, VI, X, XIV, and XVI of the Social Security Act.

necessary and from what sources verification may be secured. Nevertheless, because stigma sometimes attaches to the receipt of public assistance and social services, the Commission believes that there should be some Federal prescription of procedures to be followed by agencies so as to assure that the collateral verification process does not result in more information than necessary about a client being disclosed to third parties. Therefore, the Commission recommends:

Recommendation (3):

That the Congress require the States to provide by statute that public assistance and social services agencies must, to the greatest extent practicable, collect information and documentation directly from the client, unless otherwise requested by the client.

The Commission believes that both agency and client will benefit if the agency's need to contact collateral sources is kept to a minimum. When the client supplies documentation supporting the eligibility decision, the agency saves the time that eligibility workers would otherwise spend contacting collateral sources. At the same time, the client retains some control over the collection, use, and disclosure of information about himself. The client can usually seek records about himself from third parties without explaining why he is asking, whereas the agency would need to disclose the fact that the client is applying for or receiving a benefit and, in some cases, the nature of the benefit.

Current agency practice, according to witnesses and those who submitted written comments to the Commission, is generally for agencies to rely on clients for verification of the information they supply. Clients are usually requested to bring with them documentation of the information on the application form when they come to the welfare agency for an interview. Agencies will usually accept as evidence documents such as rent receipts, wage statements, bank books, report cards, or insurance policies supplied by the client. Client representatives stressed to the Commission that most applicants and recipients are quite able to supply adequate documentation, and that all should therefore have a chance to do so before the agency starts contacting third-party sources. Clients who are not able to obtain the information may, of course, require the agency's help in getting it.

On the other hand, Federal, State, and local agency representatives affirmed the need of agencies to contact collateral sources. They see a positive relationship between an agency's ability to contact third-party sources and its ability to reduce error rates and thus assure the accuracy of eligibility determinations. Even among the client and professional association representatives, most conceded that agencies need to contact third parties, at least under certain circumstances (e.g., where there is uncertainty about the information supplied by the client or reasonable cause to believe that the client is misrepresenting his situation), although there was little consensus among them beyond that point.

The Commission recognizes that there are circumstances that justify an agency's contacting third parties for information on clients. At the same

time, the Commission contends that applicants and recipients should have a right, albeit qualified, to determine what sources are contacted. Clients have an undeniable interest in limiting not only the number but also the kinds of sources to be contacted by agencies. Clients have reason to fear unwarranted consequences, such as loss of residence or employment, if people in certain relationships to them (e.g., landlords or employers) learn that they have applied for or are receiving public assistance or social services. Even clients who do not fear such adverse consequences may simply not wish certain individuals to know of their application for or receipt of benefits.

The Social and Rehabilitation Service, DHEW, submitted to the Commission samples of forms and letters used by State and local agencies to secure, for AFDC purposes, client authorization for the release of information from third-party sources. Several of these forms contained authorization statements which the Commission found unduly broad. For example, a South Carolina form provides that the client authorize

. . . any person, agency, or organization to furnish such information as may be requested by an authorized representative of the County Department of Social Services or the State Department of Social Services, with or without additional consent from me.

As in other areas it has examined, the Commission believes that collateral verification authorizations of that type effectively deprive the individual of any control over inquiries made about him to third parties, and are both unacceptable and unnecessary. Moreover, because of the special problems associated with being identified as a welfare applicant or recipient, the Commission also believes that no collateral contacts should be made by a welfare agency until the client has been informed that his documentation is unacceptable and why, and has had a chance to produce alternative evidence to the agency. Therefore, the Commission recommends:

Recommendation (4):

That the Congress require the States to provide by statute that a public assistance or social services agency must:

- (a) notify a client as to:**
 - (i) all types of information which may be collected about him;**
 - (ii) the techniques that may be used to collect or verify such types of information;**
 - (iii) the types of sources that may be asked to provide each type of information.**
- (b) limit its collection practices to those specified in any such notice;**
- (c) provide the client an opportunity to indicate particular sources of information which he does not want the agency to contact and to provide alternatives to those sources so indicated;**
- (d) provide the client an opportunity to withdraw his application should the agency require that a source be contacted notwithstanding his objections;**

provided, however, that such procedures shall not be required when there is a reasonable belief that the client has violated a law relating to the administration of the assistance or services program.

This recommendation, in the Commission's view, outlines an effective mechanism for balancing an agency's need to contact collateral sources against the interest of the client in limiting the collection of information about himself from others. Moreover, it also conforms to present practice in some agencies. The authorization form used by the Oregon Division of Public Welfare, for example, lists the commonly contacted sources, some by category (e.g., employers, financial institutions, schools) and others by name (e.g., agencies or organizations), and invites applicants to check the ones they authorize. The authorization form used by the Tennessee Department of Human Services lists a broader spectrum of sources to be contacted, and adds "any other individual or organization" having knowledge of the client's circumstances. There is, however, a space on the form where clients can list specific sources the Department may not contact.

It has been argued that the protections for client rights recommended by the Commission are meaningless because "everybody knows who's on welfare," and because clients must ultimately choose between bowing to the agency's insistence on contacting a "necessary" source or foregoing benefits. Since a client who needs the assistance can ill afford to forego the benefits, the argument continues, his choice is hollow. The Commission believes, however, that clients should have the opportunity to decide for themselves whether or not such rights are meaningless. Moreover, it believes that the procedural modifications outlined in the Commission's recommendations and compliance in good faith on the part of agencies and clients will offer clients intermediate alternatives to a stark choice between yielding to an agency's demands for information and foregoing assistance.

The Commission recognizes that an exception to the collateral verification practices outlined in the above recommendations may be necessary when a client is suspected of violating laws relating to the administration of the welfare programs. Under those circumstances, the agency could not logically be expected to notify the client of the verification sources it intended to contact or to ask the client to suggest alternative sources, since doing so might well compromise fulfillment of the agency's duty to gather evidence.¹³

The Commission also realizes that some States operate automated verification systems in which lists of clients are matched with records maintained by other State agencies, such as State employment agencies. Although the Commission recognizes the utility of such systems in reducing both overpayments and payments to ineligible, it believes that each client should be informed that such methods will be used and offered an opportunity to withdraw his application should he object to this means of collateral verification. Withdrawal of an application by an individual who is

¹³ The agency would, of course, have to comply with the restrictions on disclosure of records imposed by agencies and organizations from which it seeks information for a law enforcement purpose including, in some cases, the production of a subpoena.

not in fact eligible would in effect achieve the desired end—reduction of payments to ineligible.

The Commission further contends that, just as a client has an interest in limiting the number or kinds of sources contacted, he also has an interest in limiting the amount and kind of information disclosed to third-party contacts in the course of collateral verification. More specifically, while a client may not object to collateral contacts which disclose that he is seeking benefits, he may well object to a contact's learning of the particular kind of benefit sought, and the same applies to any information which does not directly relate to verification. The client's interest may be especially acute when he or she is seeking a service that is widely perceived to be sensitive, such as alcohol and drug abuse treatment or mental health counseling.

Regulations applicable to the Title XX Social Services program already require that a provider agency under a State agency contract to determine eligibility must notify a client if collateral contacts are to be made, so that a client who wishes to keep the nature of the service he is seeking confidential may ask that the State agency make the contact. When notified of the client's request, the State agency must make the necessary contact and relay the information to the provider. [45 C.F.R. 228.61(f)(1) and (2)] This regulation implies acknowledgement of the State agency's responsibility to make the contact discreetly without revealing the nature of the service being sought.

The Commission supports this regulation and recommends that it be adopted by all agencies that provide social services to clients. While the Commission understands that an agency may not be able to disguise the fact that an individual has applied for cash assistance, or some type of social service, it does believe that the specific nature of the service sought need not be revealed to a third-party source in order to obtain necessary collateral verification. Accordingly, the Commission recommends:

Recommendation (5):

That Congress require States to provide by statute that public assistance and social services agencies must give clients of social services programs the opportunity to require that collateral contacts, made to secure information about their eligibility in a services program, are made in a manner that, to the maximum extent possible, does not reveal the specific nature of the service sought by the client.

More broadly, the Commission recommends that all public assistance and social services agencies adopt a policy of revealing only the very minimum amount of any kind of information about the client consistent with obtaining verification even in cases in which it is necessary to reveal that the client has applied for cash assistance, as opposed to social services. This issue is further dealt with in the Commission's recommendation on disclosure of records, below.

FAIRNESS IN USE

ACCESS TO RECORDS

DHEW regulations governing the AFDC, Medicaid, and Title XX Social Services programs [45 C.F.R. 205.10(a)(13)(i)] specify that an applicant or recipient who has requested a hearing may examine at reasonable times before the date of the hearing, as well as during the hearing, the contents of his case file and all documents and records to be used by the agency at the hearing. A hearing may be requested by a client whose claim for benefits has been denied or not acted upon with reasonable promptness, or who has been aggrieved by any agency action resulting in suspension, reduction, discontinuance, or termination of assistance.

Regulations applicable to the Food Stamp program afford clients who have requested a hearing a more limited right of access: these clients may examine at reasonable times before and during the hearing only those documents and records to be used by the agency at the hearing. [7 C.F.R. 271.1(o)(5)(i)] A hearing may be requested by a client whose household has been aggrieved by any action of the State agency, or of a coupon-issuing agency, in the course of its administration of a Food Stamp program, provided the action affects the participation of the household in the program.

Although the DHEW regulations governing hearings in the Medicaid, AFDC, and Social Services programs specify that a client may inspect the contents of his *entire* case file, the Commission has found substantial evidence to suggest that agencies often do not, in fact, make the entire case file available on request. To the extent that this is true, a client is denied the opportunity to decide what information in the case file he feels should be introduced at the hearing. For example, a representative of Community Legal Services, Philadelphia, Pennsylvania, attested that a client's right to full access to his case file before and during the hearing process is not always respected, noting:

. . . 45 C.F.R. 205.10(a)(13)(i) allows for inspection of case files and documents when there is a hearing, but is written in such a way that most States feel that it only gives the recipient the right to inspect such documents as are actually produced in evidence for the hearing. This leads to significant problems, since a lot more information may prove useful to the person, including any exculpatory evidence that he may want to raise or that the administration may know of. . . .¹⁴

For another example, a manual for welfare advocates in New York City prepared by Community Action for Legal Services, Inc. noted that New York State and New York City policies regarding access to the case record are more restrictive than Federal policy. For example, New York City regulations provide that, upon request, the client or his authorized representative is entitled to receive copies of only those portions of the

¹⁴ Testimony, Public Assistance and Social Services Hearings, January 11, 1977, p. 587.

client's record which would be "beneficial" to the client [18 *New York Code of Rules and Regulations (N.Y.C.R.R.)* 357.3(c)] or which will be introduced at a hearing. [18 *N.Y.C.R.R.* 358.9(d) and 358.12 (a)] The manual advises advocates that when access is denied, the denial should be raised as an issue at the hearing.¹⁵

The Commission also received a written comment from the Land of Lincoln Legal Assistance Foundation, Inc. (Danville, Illinois) citing its attorneys' inability to obtain full access to a client's case record. The Foundation states that even when the client's written authorization has been obtained, the local department of welfare will not permit a client's attorney to examine any portion of the client record unless a notice of appeal to initiate a hearing has been filed with the department. After the notice has been filed, according to this comment, the local department will allow examination only of material relating specifically to the issues raised in that notice.

Even if full access to the case file prior to a hearing were in all cases permitted, the applicant or recipient with no legally acceptable reason to seek a hearing cannot currently be assured an opportunity to inspect his record, and so can neither discover nor request correction of inaccuracies. Moreover, except for these rights of access in connection with the hearing procedure, the four major welfare programs are not required by Federal law to permit a client to inspect records about himself, nor are other public assistance and social services programs. Although in some instances eligibility workers may, upon client request, give a client access to records about himself, this is usually at the sole discretion of the eligibility worker involved with the case.

The Commission believes that without a general right of access a client cannot make informed decisions about the use of information in a record by others than the welfare agency, nor can he discover and request correction of inaccuracies in the record before the information is used to his detriment. The Commission believes that the right of access is an essential component of fairness in record keeping and therefore recommends:

Recommendation (6):

That the Congress require States to provide by statute that a client who is the subject of a record maintained by a public assistance and social services agency shall have a right to see and copy that record upon request.

The Commission recognizes that implementing the general right of access may put additional administrative burdens and cost on the agencies and individuals charged with welfare administration.¹⁶ Data gathered by the Commission indicates, however, that the advantages and protections

¹⁵ Community Action for Legal Services, Inc., *Manual for Welfare Advocates in New York*, New York, 1976, p. 125.

¹⁶ The Commission believes that if any fees for copying records are charged clients, they should not exceed the actual cost of copying, and further, that fees should be closely related to the ability of clients to pay them.

afforded the client would far outweigh the additional burden, especially if agencies are allowed to set reasonable limits on the hours during which clients may view their records. The Minnesota Data Privacy Act, for example, gives individuals a right of access, with certain qualifications, to information maintained about them by the State. Representatives of the Minnesota Department of Public Welfare attested to the Commission that:

We anticipated that far more clients would ask to see their record than we could possibly process. To our surprise, this multitude did not materialize. As we look back on it now, we attribute the lack of interest to the openness by which most of the counseling, therapy, and casework operations are carried out by our local agencies. Our agencies have kept clients reasonably well informed during our involvement with them—how they will use the information, with whom they will share it, et cetera—to the extent that most clients probably don't feel the record would tell them anything they don't already know¹⁷

The Commission expects that the openness which its other recommendations should foster will minimize clients' demands for access to their records.

The arguments presented to the Commission in oral testimony and written comments brought out the need to qualify or deny the right of access in certain situations. The Commission identified six kinds of situations meriting special consideration:

1) *Clients' access to medical information.*¹⁸ Agency records on clients may include sensitive information regarding a client's physical or mental health or status (e.g., information regarding the physical or mental incapacity of an AFDC client). Allowing clients access to such information might, in some instances, jeopardize their health or impede their recovery. The Commission heard a number of recommendations that the right of access be qualified when, in the opinion of a qualified medical professional, full access might adversely affect the client. In such cases, an alternative might be to assign the client's right to full access to someone qualified to represent him. When a medical record is the basis of an adverse determination about a client, however, the Commission believes that it should be available to him.¹⁹

2) *Parents' access to records of minors.* Should a parent or guardian be granted access to the child's record? Should the minor be granted access? Most of the opinions submitted to the Commission held that a minor who seeks treatment on his own initiative (e.g., for family planning services, drug rehabilitation) should have access to that record, especially if State law permits the minor to obtain treatment without the knowledge or consent of

¹⁷ Testimony, Public Assistance and Social Services Hearings, January 11, 1977, p. 764.

¹⁸ As noted earlier, the recommendations in this chapter are not intended to apply to records maintained by medical-care providers rendering services to Medicaid and Title XX clients, except insofar as they are used to determine eligibility. Recommendations regarding client access to, and correction of, records maintained by medical-care providers are found in Chapter 7.

¹⁹ See Chapter 7 for additional discussion of this problem.

his parents. Furthermore, it was argued that parents or guardians of such minors be given access in such situations only upon the minor's authorization. These arguments are based on the belief that a minor is likely to be discouraged from seeking necessary treatment by the knowledge that his parents will be notified that he is seeking the treatment and, especially, if he knows that his parents will have access to his records.

3) *Access to adoption records.* The Commission, which unfortunately could not make a study of the special problems involved in access to adoption records, suggests that this matter be addressed in a special inquiry.

4) *Clients' access to information submitted under assurance of confidentiality.* Agency administrators stressed to the Commission their belief that it would be impossible for them to get the information necessary for the detection of fraud if they could not promise the sources of such information confidentiality. This is true primarily in cases in which the source is an individual, rather than a record maintained by another agency or organization. Opinions differed as to whether or not both the source and the information provided should be kept confidential. It was generally agreed, however, that information provided by confidential sources should not be used as the basis of an adverse decision about the client unless it could be revealed to the client prior to, or during, a hearing. Implicit in this argument is the Commission's belief that an agency should adequately inform its sources of information about the agency's policies regarding the release of information to the client. Furthermore, upon soliciting or accepting information about a client from a source seeking an assurance of confidentiality, the agency should determine whether the source would be willing to have the information he supplied revealed to the client during a hearing—that is, whether he is seeking an absolute guarantee of confidentiality that extends not only to his name but to the information he supplies. His decision will influence the uses to which the agency will be able to put such information.

Arguments in favor of protecting the confidentiality of informants indicate that confidential sources may be essential in detecting and investigating cases of child abuse and neglect. Agency representatives are convinced that the very people who are in a position to know of abused or neglected children would be unwilling and often afraid to report the situation if they could not report in confidence. Those who report such cases may have good reason to fear reprisal, especially if the informant is a member or close friend of the child's family.

5) *Access during an investigation of a violation of laws relating to the administration of a program.* The argument for this exception is that allowing clients suspected of fraud access to their records would give guilty clients a chance to evade justice by concealing or destroying evidence or by absconding.

6) *Access to records covering more than one client.* Public assistance and social services records often contain information about more than one individual. AFDC records, for example, deal with individuals as members of an assistance unit; Food Stamp records treat individuals as members of their household; and a services agency may keep a single record on several

individuals who apply as a group. These records raise special access problems. For example, which members of an assistance unit, household, or treatment group have a right of access to the entire record? Does a member have the right to the record's information concerning the other members, or only the information on himself or herself? Has a minor a right of access to information maintained on his parents?

The Commission found merit in the arguments for qualifying or denying access in the situations described above. On the theory that the States rather than the Federal government are best able to find reasonable solutions to the problems they raise, the Commission recommends:

Recommendation (7):

That the Congress permit the States to enact provisions of law that:

- (a) provide that a medical record may be disclosed either directly to the client or through a medical-care professional designated by the client, provided, however, that a client must be given direct access to any medical-record information that is used to make a determination about his eligibility;**
- (b) restrict a parent or guardian's access to a minor's record, or a minor's access to a record that contains information about him;**
- (c) provide that the source of information in a record, or the information itself to the extent that it would reveal the identity of the source, need not be disclosed to the client if the source is an individual who has requested an assurance of confidentiality or, absent such a request, if disclosure can reasonably be expected to result in harm to the source, provided, however, that an adverse determination may not be based on information that is not disclosed to the client;**
- (d) deny a client access to a record that is being used for an ongoing investigation of a suspected violation by the client of a law relating to the administration of the welfare program; and**
- (e) provide for segregation of information in records maintained about multiple subjects so that a client may see only that information in a record that pertains directly to him.**

CORRECTION OF RECORDS

As in the other areas it has studied, the Commission believes that an individual's right to review records about himself is of little value unless a procedure for correcting any erroneous information he may find is available to him as a matter of right. If the client could inspect but not request correction of information in records, inaccurate, outdated, irrelevant, or incomplete information could be used by the welfare agency or others to unfairly deny him a right, benefit, or opportunity. Accordingly, the Commission recommends:

Recommendation (8):

That the Congress require States to provide by statute that public assistance and social services agencies will permit a client to request correction or amendment of a record pertaining to him, and that the agency must:

- (a) promptly correct, amend (including supplement), or delete any portion thereof which the individual can show is not accurate, timely, relevant, complete, or within the scope of information which he was originally told would be collected about him, except that in the case of a medical record, the agency shall disclose to the client the identity of the medical-care provider who was the source of the record, and, if the latter agrees to the requested correction, the agency must make the correction;
- (b) assure that any corrections, amendments, or deletions are reflected wherever information about the client is maintained that is similar to that which has been corrected, amended, or deleted; or
- (c) inform the client of its refusal to correct, amend, or delete part of the record in accordance with his request and the reason(s) for the refusal, permit the client to have the refusal reviewed at a hearing, and permit a client who disagrees with the refusal to correct, amend, or delete the record to have placed with the record a concise statement setting forth his disagreement; and further
- (d) provide reasonable procedures to assure that corrections, amendments, and deletions made pursuant to (a), or statements of disagreement filed pursuant to (c), are made available to prior and subsequent recipients of the record.

It should be noted that adoption of this recommendation would broaden the conditions under which a client may request a hearing. Currently, a client cannot obtain a hearing to challenge information unless that information has been used as the basis of an adverse decision against him. The Commission wishes to emphasize, however, that this proposal to expand the use of the hearing process should not be interpreted as a license for clients to contest earlier hearing decisions about the merits of cases, although the correction of information may, of course, be relevant to a future decision.

The injustices that may be perpetrated because clients lack a means of forcing a welfare agency to correct information in their files which they believe to be inaccurate, or to place in the file a statement of dispute, are illustrated by the experience of Catherine Tarver. Tarver, an AFDC recipient, learned that a caseworker's report in the file on her maintained by the Department of Health and Social Services in the State of Washington contained detailed allegations accusing her of child neglect. Shortly after the report was written, Tarver had been exonerated of these charges by a juvenile court. With this exoneration to back her, she asked the county

Department of Public Assistance for a hearing to request it to correct its file, but the Department refused. The Washington State Supreme Court supported the Department, holding that the hearing provision was not intended as a forum in which to litigate general grievances against the Department's administration of the welfare laws. [*State ex rel. Tarver v. Smith*, 78 Wash. 2d 152, 470 P.2d 192 (1970); *cert. denied*, 402 U.S. 1000 (1971)]

Although adoption of *Recommendation (8)* would not mitigate such past injustices, it would go far toward preventing future ones.

ACCURACY, TIMELINESS, COMPLETENESS, AND RELEVANCE

The Commission recommends:

Recommendation (9):

That the Congress require States to provide by statute that public assistance and social services agencies must have reasonable procedures to assure that all records they use in making any determination about a client are maintained with such accuracy, timeliness, completeness, and relevance as is reasonably necessary to assure that the records themselves are not the cause of an unfair determination.

Those who suffer when benefits are unfairly denied are not the agencies, but people who are already experiencing hardship. Thus, it is clear to the Commission that both the agency and its clients should share the responsibility for assuring the accuracy, relevance, timeliness, and completeness of the agency's files. Clients have an obvious interest in seeing that the responsibility is fulfilled, but the agencies' obligation is nowhere spelled out in Federal law. When benefits are unfairly denied because of carelessly kept records, the affected person has only one formal, assured recourse: to ask for a hearing where he can at least challenge the accuracy of the information used as a basis for the adverse decision.

The Commission's recommendations regarding the general right of access and procedures for requesting correction would provide a second and more comprehensive safeguard. *Recommendation (9)*, above, provides a third. For example, it would encourage agencies to investigate third-party source information before entering it in a record or relying on it to make a judgment, and might prompt agencies to take the obvious step of asking the client to explain or document information that may be inaccurate before incorporating it in the file.

It should be noted that many agencies are consciously attempting to modify the traditional practice of routinely including in a case file not only the worker's professional assessment of the client's circumstances, behavior, and needs, but also notes on almost everything that transpires between worker and client. While that practice may sometimes work to the client's best interest, it often means that irrelevant and extremely subjective judgments become part of the file. Such judgments are useful only to the extent that social workers have been trained to recognize information

pertinent to the case, and not all personnel employed by public assistance and social services agencies have such training. This is increasingly true of eligibility workers, many of whom have had no professional training.

Comments received by the Commission indicate that many agencies currently consider fulfilling their responsibility for accuracy, timeliness, completeness, and relevance as fully consistent with sound public assistance and social services delivery practices. For example, the Iowa Department of Social Services noted that acceptance of such responsibility:

. . . would appear to be the practice in any agency which follows personal and professional, accepted ethical standards, and which complies with an effective administrative procedures act, especially concerning contested cases.²⁰

Expectation of Confidentiality

DISCLOSURE OF CLIENT RECORDS

Any comprehensive revision of Federal policy on disclosure must start with an assessment of the adequacy of present restrictions. In considering the matter of confidentiality, the Commission was guided by the principle that records about individuals should not be disclosed for purposes incompatible with those for which they were compiled without the consent of the individual, except as specifically authorized by law.

The Commission was not able to analyze the statutory constraints on the use or disclosure of information about clients in all of the federally assisted programs. A review of some of these laws, however, was enough to show that coverage is distinctly uneven. For example, there are no provisions on confidentiality in the laws regarding the National School Lunch Program, Maternal and Child Health Services, and Services for Crippled Children. By contrast, the regulations governing Juvenile Delinquency Prevention Programs require that records about youths served by these programs "shall be held to be confidential," and the ". . . use of such information and records shall be limited to purposes directly connected with the system" [45 C.F.R. 1350.61(c)]

There are also variations in the statutes governing the four programs studied in detail. While Federal statutes and regulations require State plans for carrying out AFDC, Medicaid, and Title XX Social Services programs to include certain provisions relating to the confidentiality of program records, the specific requirements are not the same for all three. Thus, a State plan for AFDC must prescribe restrictions on the use or disclosure of information concerning applicants or recipients to purposes directly connected with:

- the administration of the AFDC, Child Welfare, Work Incentive, Medicaid, Social Services, or Supplemental Security Income programs;

²⁰ Submission of Commissioner, Iowa Department of Social Services, Public Assistance and Social Services Hearings, January 11, 1977, p. 5.

- any investigation, prosecution, or criminal or civil proceeding conducted in connection with the administration of any such plans or programs; and
- the administration of any other Federal or federally assisted program which provides assistance in cash or in kind, or services, directly to individuals on the basis of need. [42 U.S.C. 602(a)(9)]

The AFDC statute also prohibits disclosure of individually identifiable information about clients to any committee or legislative body. Under another provision of Federal law, a State may, notwithstanding the confidentiality provisions cited above, enact a law making the names of AFDC recipients and the amount of assistance they receive available to the public. Finally, DHEW regulations governing the AFDC, Medicaid, and Title XX Social Services programs provide that:

In the event of the issuance of a subpoena for the case record or for any agency representative to testify concerning an applicant or recipient, the court's attention is called, through proper channels, to the statutory provisions and the policies or rules and regulations against disclosure of information. [45 C.F.R. 205.50(a)(2)(iv)]

Agency officials are apparently successful in contesting such disclosure in most, but not all, cases.

The Federal statute governing the Medicaid program provides that a State Medicaid plan must:

provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the plan. [42 U.S.C. 1396a(a)(7)]

The Social Security Act also contains restrictions on the use of information concerning Title XX Social Services clients, namely:

the use or disclosure of information obtained in connection with administration of the State's program for the provision of the services [funded under Title XX] concerning applicants for and recipients of those services will be restricted to purposes directly connected with the administration of that program, the plan of the State approved under part A of Title IV [AFDC], the plan of the State developed under part B of that title [Child Welfare Services], the Supplemental Security Income program established by Title XVI, or the plan of the State approved under Title XIX [Medicaid]. [42 U.S.C. 1397b(d)(1)(B)]

Finally, the Federal statute establishing the Food Stamp program provides that a State Food Stamp plan must include:

safeguards which restrict the use or disclosure of information obtained from applicant households to persons directly connected with the administration and enforcement of the provision of [the

Food Stamp Act] or the regulations issued pursuant to [the Act]. [7 U.S.C. 2019(e)(3)]

The Commission reached several conclusions about the adequacy of current disclosure policy.

1) *Federal disclosure policy for federally assisted programs is neither consistent nor comprehensive.* While the four programs the Commission studied in detail do contain restrictions on disclosure of program records, some of the other federally assisted programs do not, and the policies of still others are inconsistent with those of the major programs.

For example, Federal policies on disclosure of alcohol and drug abuse treatment records [42 U.S.C. 4582 and 21 U.S.C. 1175] differ from those applicable to records maintained under the Title XX program, which also funds alcohol and drug abuse treatment services. Thus, there has been confusion about what rules should be applied to a treatment provider who receives funding from Title XX as well as other Federal government sources.²¹

For another example, the statutes and regulations governing the provision of legal assistance under grants made by the Legal Services Corporation contain one provision relating to confidentiality, namely that:

. . . neither the [Legal Services] Corporation or the Comptroller General shall have access to any reports or records subject to the attorney-client privilege. [42 U.S.C. 2996h(d)]

By contrast, the statute governing confidentiality of Title XX legal services records also limits permissible disclosures for non-Title XX purposes but permits the imposition of reporting requirements that would, in the opinion of some groups, violate the attorney-client privilege.

For a third example, family planning assistance is provided under Title X of the Public Health Service Act, and also under Title XX of the Social Security Act. Regulations implementing Title X provide that:

Each grant award is subject to the condition that all information obtained by the personnel of the project from participants in the project related to their examination, care, and treatment, shall be held confidential, and shall not be divulged without the individual's consent except as may be required by law or as may be necessary to provide service to the individual. [42 C.F.R. 59.10]

This provision for confidentiality differs from the one found in the Title XX statute

Finally, regulations governing services to individuals under the Older Americans Act provide that:

. . . the State agency will take steps to insure that no information

²¹ Section 2003(f) of the Social Security Act currently provides that "The provisions of Section 333 of the Comprehensive Alcohol and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 [pertaining to the confidentiality of records] shall be applicable to services provided by any State pursuant to this title with respect to individuals suffering from drug addiction or alcoholism."

about, or obtained from, an individual, and in possession of an agency providing services to such individual . . . shall be disclosed in a form identifiable with the individual without the individual's informed consent. [45 C.F.R. 903.139]

This regulation is significantly stricter than those applicable to records about senior citizens services provided under Title XX.

2) *By applying different disclosure criteria to federally assisted and non-federally assisted programs, Federal disclosure policies erect a statutory barrier that hampers the work of both.* For example, AFDC program records may circulate to other federally assisted programs, however remote in purpose from the AFDC program, but disclosure to a program funded solely by a State is prohibited without client consent, even when the aims of the State program are closely allied with those of AFDC. Similarly, Title XX records may be circulated freely among Title XX providers of quite unrelated services but not to a State-funded social services program without the client's consent.

3) *In all four main programs, the same disclosure restrictions apply to both factual data regarding an individual's eligibility and level of need (e.g., income, assets, resources, number of children), and the record of a client's physical or mental condition.* Thus, sensitive information regarding an AFDC recipient's physical incapacity may be disclosed just as freely as the simple fact that the recipient has three children. Failure to establish different criteria for different categories of information encourages either undue restriction of factual data needed for effective program administration, or inappropriate disclosures of sensitive material which may derive from subjective judgments.

The Commission found a need for a comprehensive policy on client record disclosures that would apply uniformly to all public assistance and social services records maintained by State and local government agencies, if the rights of clients are to be consistently protected and if welfare programs are to be effectively administered. It then addressed the question of how to formulate such a policy, and what it should cover.

The Commission considered recommending that Congress enact a detailed statute regulating disclosures of records maintained by all assistance and services agencies receiving Federal funds. It rejected this solution for several reasons:

- the differences in State programs and their administration made it unlikely that the Commission could formulate a workable single policy;
- a detailed Federal policy would tend to frustrate innovative State records-management practices, such as the development of multi-purpose application forms and integrated management information systems;
- any detailed Federal policy would undoubtedly conflict with State fair information practices statutes that apply to welfare records as well as to other State agency records; and
- a single policy could not reflect the different trade-offs

different States would make between confidentiality and other values.

Instead of a detailed Federal policy, the Commission has chosen to recommend broad Federal guidelines which leave latitude for the States to arrive at their own specific policies. Accordingly, the Commission recommends:

Recommendation (10):

That the Congress provide by statute that no disclosures of records about a public assistance or social services client may be made without the authorization of the client, unless disclosure has been specifically authorized by State statute, which must contain:

- (a) provisions relating to the permissible uses and disclosures of individually identifiable information about clients for purposes related to the administration and enforcement of the specific program for which the information was acquired, as well as for purposes related to the administration and enforcement of other public assistance and social services programs for which the individual has applied, is required to apply, or may be eligible;**
- (b) a prohibition on the disclosure of individually identifiable information about clients to members of the public and to legislative committees;**
- (c) a prohibition on the use or disclosure of individually identifiable information about clients for purposes unrelated to the provision of public assistance and social services without the consent of the client, provided, however, that:**
 - (i) disclosure necessary to assure the health or safety of the client or another individual in compelling circumstances may be permitted;**
 - (ii) disclosure made pursuant to a court order may be permitted if the agency has contested the order, provided, however, that adequate notice and ability to participate in any action regarding the order has been provided the client if the client is the subject of the investigation or prosecution in furtherance of which the court order is issued; and**
 - (iii) disclosure for a research or statistical purpose may be permitted, provided, however, that:**
 - (A) the agency maintaining the information ascertains that use or disclosure in individually identifiable form is necessary to accomplish the purpose for which disclosure is made;**
 - (B) further use or disclosure of the information or record in individually identifiable form is prohibited without the express authorization of the agency or the client;**

- (C) reasonable procedures to protect the record or information from unauthorized disclosure are established and maintained by the recipient, including a program for removal or destruction of identifiers; and
- (D) the agency determines that the research or statistical purpose for which any disclosure is to be made is such as to warrant risk to the individual from additional exposure of the record or information;
- (d) provisions stating which redisclosures of individually identifiable information may be made by agencies or persons authorized to obtain such information; and
- (e) a requirement that all permissible disclosures be limited to information that is necessary and relevant to the purpose for which disclosure is made, including those disclosures made for collateral verification purposes.

Finally, the Congress should provide that when enacted, the required State statute shall constitute the sole authority for disclosures of client records maintained by public assistance and social services agencies receiving Federal funding except that 42 U.S.C. 4582 and 21 U.S.C. 1175, regarding the confidentiality of alcohol and drug abuse treatment records, will continue to be in force.

The Commission feels that this recommendation outlines a sensible approach to the complex problem of handling the disclosure of client records. These recommendations seek to resolve problems created by inconsistency in Federal confidentiality policies by requiring each State to develop a comprehensive statute tailored to the State's particular needs, regulating disclosure of records about clients of *all* federally assisted programs operating in the State, as well as of other programs operated within the State by agencies that receive Federal funds. The Commission believes that the State, rather than the Federal government, is best able to define specifically the limits of permissible disclosure within broad limits set by Federal law for all the States. The Federal government cannot be expected to appreciate fully the particular needs which guide each of the 50 States in administering its programs, nor can the Federal government respond as effectively as the States to future changes in these particular needs.

On the other hand, the recommended measures do not give the States a license to ignore a client's right to be treated fairly. Three features of the recommendations seek to assure that the policies formulated by the States will be fair to the individual.

First, the recommended process for States to follow in formulating their policies provides for public participation. Specifying that the policies be enacted into statute means that their adoption must follow the legislative process, and that they will not be changed without public involvement. The Commission's general recommendations further require public hearings to precede enactment of such a State statute.

Second, the recommended measures require State statutes to be faithful to a key principle of fair information practice—that information acquired for one purpose should not be used for an unrelated purpose without the individual's consent, either actual personal consent or consent as collectively arrived at through the legislative process. Thus, the recommended measure requires that a State's statute forbid disclosures of public assistance and social services records without the consent of the individual to whom they pertain, unless such disclosure is specifically authorized by statute. The authorizations in the statute should be sufficiently specific so that clients will either know or can find out the particular purposes for which information about themselves will be used.

Finally, the recommended Federal statute would require States, in enacting their own statutes, to adhere to minimum standards regarding permissible disclosures. As long as a State's statute complies with these recommended standards, State legislators can incorporate into their statute those disclosure policies that reflect their own State's administrative needs and citizen concerns. The Congress could, of course, require that States enact provisions of law that permit Federal auditors to have access to welfare records. In that regard, the Commission urges the Congress to follow the recommendations set forth in Chapter 9 for government access to records.

The recommended measure allows States to enact statutes which permit disclosures without client consent *within* the welfare system. It would, however, prohibit disclosure of individually identifiable records to the general public or to legislative committees, or for purposes unrelated to the provision of public assistance and social services, except under certain narrow conditions. Disclosures of client records without authorization would be permitted under compelling circumstances affecting the health or safety of the client or another individual, and for use in research or statistical activities. In cases in which a court order is issued to an agency for a client record, the recommendation would permit disclosure in response to the court order only if the agency contested the order, and if the client who is the subject of the record were given notice and an opportunity to participate in any proceedings regarding the order. Notice to, and participation by, the client would be required only if he is the subject of the investigation or prosecution for which the court order is issued. Moreover, the Commission understands that the States, in enacting the recommended statute, may well wish to limit the number of record subjects who would receive notice when the record being sought contains information about all the members of an assistance unit or household.

These prohibitions on disclosure are generally consistent with existing Federal and State disclosure policies, except insofar as States are currently free to pass statutes making certain information about AFDC recipients available to the general public. The Commission found no compelling arguments supporting disclosure to the public that outweighed the possible harm or embarrassment that would result if a recipient's name and amount of assistance were publicly available.

Another recommendation—that States be required to apply the same

safeguards as in federally assisted programs to client records of programs that are not federally assisted but that are maintained by agencies receiving Federal funding—would assure consistency in all a State agency's public assistance and social services record-keeping activities. It would also facilitate necessary flows of information between federally assisted programs and those in which there is no Federal involvement.

The Commission believes that in enacting the recommended statute, States may wish to apply different—probably more restrictive—disclosure standards to subjective or judgmental information regarding a client's mental or physical health or status than to factual information regarding eligibility. The Commission would approve of an approach that takes into account the relative sensitivity of different types of information.

Another important principal reflected in *Recommendation (10)* is that no more information should ever be disclosed than the minimum necessary to accomplish the purpose for which disclosure is made. As noted earlier, this is crucial when collateral verification of information supplied to the agency by the client is necessary.

Examples of the benefits to be expected from adoption of the recommended measures are not hard to find. California, for example, has a State-funded program for providing cash assistance to intact families with an unemployed father or mother. The eligibility criteria for this State program are more liberal than those of the Federal AFDC-Unemployed program, which California also administers. A single family—whose situation with respect to employment may vary from month to month and thus who may qualify under different programs in successive months—may one month receive a check partially paid for out of Federal funds, and the next month one financed solely by the State treasury. The client may not realize who is footing the bill from month to month. There is only one case record about such a family—that is, there is not one record of the family's eligibility for Federal help and another of its eligibility for the State program. AFDC case records cannot, however, by Federal law, be used in the administration of a solely State-financed assistance program. The recommended measure would eliminate such problems of technical compliance with detailed Federal requirements and few people would argue that an outcome reinforcing present practice in this case would represent an unwarranted invasion of the client's privacy.

Another example concerns the development of multi-purpose application forms. Where there is a common set of data elements used to determine a client's eligibility for several programs, it would clearly be economical to collect such information on only one form. Such simplification would be welcomed by clients as well as by agencies. Some States, in fact, have been trying to develop such a form. Their efforts may be impeded by the fact that, for example, information about Food Stamp eligibility may not be disclosed to persons unrelated to the administration of the Food Stamp program, so that a multi-purpose application might violate the Federal Food Stamp disclosure law.

If the Commission's sampling of Federal confidentiality laws is a fair indication, the minimum protections guaranteed by the recommended

measure would not significantly reduce any protections individuals currently enjoy. In one special area, however, it might be argued that the form of the recommended measure might create the *risk* of undermining privacy rights. The argument concerns alcohol and drug abuse treatment records. Because these kinds of records are extremely sensitive, and because individuals with problems relating to use of alcohol and drugs must be encouraged to seek needed treatment, the Federal government has formulated very restrictive policies regarding permissible disclosures of alcohol and drug abuse treatment records. The Commission recommends that these policies not be modified, and further, that they continue to apply to alcohol and drug abuse treatment records maintained by every program receiving *any* Federal funds (including Title XX funds), whatever the provisions of State statutes.²²

Notification of Rights

The Commission believes that in order for a client to exercise the rights its recommendations would establish, he must be cognizant of those rights, and of agencies' information management practices. Therefore, the Commission recommends:

Recommendation (11):

That the Congress require States to provide by statute that public assistance and social services agencies must inform each client in plain language of:

- (a) **the kinds of records that the agency maintains, and the purposes for which the information in those records may be used;**
- (b) **the client's right to see, copy, and request correction of a record about himself;**
- (c) **whether information requested of the client by the agency *must* be provided as a condition of eligibility for public assistance and social services, or whether providing it is voluntary;**
- (d) **of the agency's procedures regarding collateral verification [as required by *Recommendation (4)*], including its use of inter-agency and inter-jurisdictional data exchanges; and**
- (e) **the provisions of the State statute governing disclosure.**

Regulations currently applicable to the AFDC and Medicaid programs already provide that agencies must inform applicants about their rights and obligations under the program. They require that applicants be notified, either in written form, or orally when appropriate, of the coverage, eligibility, and scope of the program, of related services available to them, and the rights and responsibilities of applicants for and recipients of assistance. To fulfill this requirement agencies must develop bulletins and pamphlets which explain the rules of eligibility and appeals in simple,

²² The statutory requirements for confidentiality of drug and alcohol patient records are found at 42 U.S.C. 4582 and 21 U.S.C 1175.

understandable language. Such bulletins or pamphlets must be publicized and available in quantity. [45 C.F.R. 206.10(a)(2)(i)]

Thus, there is already some precedent for requiring agencies to notify clients of their rights. Comments received by the Commission indicate that giving the recommended notice of an agency's record-keeping policies and practices would not create excessive administrative burdens for agencies. The Commission believes that the recommended notice should be made available to clients in their primary language wherever possible.

Subsection (c) of the above recommendation reflects the Commission's concern that to limit intrusiveness, clients should know whether they are required to disclose information about themselves as a condition of receiving assistance, or whether disclosure is voluntary.

Remedies for Violations of a State Statute

The Commission believes that a State statute regarding fair information practice in welfare record keeping would not be complete if it did not provide remedies and penalties for violation of its requirements. Accordingly, the Commission recommends:

Recommendation (12):

That the Congress require the States to provide by statute that appropriate remedies and penalties will be available in cases in which a public assistance or social services agency violates a provision of the State fair information practice statute.

Although the Commission feels that the States are best able to determine what type of remedies and penalties are appropriate, it believes that its suggested amendments to the civil remedies and criminal penalties sections of the Privacy Act of 1974 represent a model for the kinds of statutory provisions the States would be required to enact.²³

CHILD SUPPORT ENFORCEMENT

There is one area of public assistance and social services record keeping that seemed to merit the Commission's special attention: record keeping carried out in connection with Child Support Enforcement activities. The Commission promised to address this issue in its June, 1976 report on *Federal Tax Return Confidentiality*.

Although the recommendations thus far made in this chapter are intended to apply to Child Support Enforcement programs, they do not address all of the special record-keeping issues that arise in that particularly controversial area. Therefore, the Commission includes below a brief description of the program and several specific recommendations that apply only to it.

Part D of Title IV of the Social Security Act authorizes Federal grants

²³ See Chapter 13 for a discussion of the suggested revisions.

to the States for the purpose of locating absent parents who have defaulted on their child support obligations, for establishing the paternity of children for whom child support may be owed, and for enforcing child support obligations. To be eligible for Federal grants for these purposes, a State must establish a State Child Support Enforcement agency and a State Parent Locator Service within the agency. The agency's functions may be performed either by that agency or by law enforcement officials (e.g., district attorneys, State attorneys general) who have entered into cooperative agreements with the agency. The agency may also contract with private investigatory agencies for assistance in locating absent parents.

In addition to providing Federal financial assistance for State child support enforcement activities, Title IV-D established an Office of Child Support Enforcement within the Department of Health, Education, and Welfare to oversee States' administration of the program, as well as a Federal Parent Locator Service within that Office to aid in the location of absent parents. Although the primary purpose of the Child Support Enforcement program is to find the parents of children who are AFDC recipients and to see that they fulfill their parental obligations, the State Child Support Enforcement agencies and the Federal Parent Locator Service (PLS) may make their services available, for a fee, to individuals who are not AFDC recipients.

Title IV-D of the Social Security Act does not prescribe statutory standards for the safeguarding of information obtained by State Child Support Enforcement agencies. Federal regulations provide that States, pursuant to State statutes which impose legal sanctions, shall apply the same limitations on the use or disclosure of information concerning applicants and recipients of child support enforcement services as are prescribed for AFDC records. [45 C.F.R. 302.18] Additionally, the regulations require that all requests for information from a State to the Federal Parent Locator Service shall include a statement, signed by the head of the State Child Support Enforcement agency or his designee, affirming both that information obtained from the Federal Parent Locator Service will be treated as confidential and safeguarded pursuant to the requirements of the AFDC confidentiality regulations, and that the State agency will take protective measures to safeguard information transmitted to and received from the Federal Parent Locator Service [45 C.F.R. 302.70(e)(2) and (3)].

The Commission finds that these regulations do not adequately safeguard the information collected by State IV-D agencies about the individuals being sought. The regulations only place limits on the use and disclosure of information about absent parents obtained from the Federal PLS, and do not apply to information regarding absent parents obtained by State agencies from State and local sources.

Information on missing parents is collected by State and local AFDC offices, and by the State Child Support Enforcement agencies. Both ask a client for basic identifying information such as the name, address, and Social Security number of the absent parent. In addition, clients may be asked about the absent parent's work and social life. For example, in Michigan a "support specialist" responsible for locating an absent parent

must, as the first step of the location procedure, ask for information including, but not limited to, the absent parent's employment, occupational skills, work shift, date and place of marriage, physical description, names of creditors, names and addresses of friends or relatives, arrest record, and memberships in fraternal organizations. In addition to the information obtained from the client, and from the AFDC office, the record will include any information that can be gathered from other sources contacted in the course of the location effort.²⁴

The Commission believes that the standards regarding confidentiality currently contained in regulations should be embodied in statute, so that they can be changed only by the legislative process, and not at the discretion of agencies. Moreover, the Commission believes that information about absent parents, as well as AFDC clients, should be subject to these statutory safeguards, and that the use of information about absent parents obtained from the Federal Parent Locator Service should be confined to the purposes for which the State acquired it.

Consistent with these findings, the Commission recommends:

Recommendation (13):

That the use and disclosure of information obtained on applicants for and recipients of child support services as well as on alleged absent parents should be subject to the same statutory disclosure policy called for by *Recommendation (10)*. Furthermore, Congress should require by statute that information obtained by State agencies from the Federal Parent Locator Service regarding absent parents may not be disclosed for purposes unrelated to the establishment of paternity, the location of the parent, or enforcement of child support obligations, except to the extent that disclosures of such information result from court proceedings.

The Commission also believes that Section 454(8) of the Social Security Act, which mandates that States utilize all sources of information and available records should be qualified to except explicitly the classes of information which may not be disclosed under State or local laws. If, in the judgment of a State legislature, the nature of certain data warrants holding that data confidential, the State Parent Locator Service should be required to respect the legislature's judgment, and should not be held not to be in compliance with Federal law for doing so. For example, the Commission learned during its Tax Return Confidentiality hearings that an Ohio tax statute [*Ohio Revenue Code §5747.18*] holds data maintained by the State Department of Taxation confidential. The Ohio Department testified before the Commission that it refuses requests for information from the State PLS. In written testimony a representative of the Ohio Department of Taxation noted:

. . . some provisions of the Federal welfare laws, specifically the parent-locator service provisions, encourage, if not require, efforts

²⁴ State of Michigan, Office of Standards and Investigation, Item CR-240, September 8, 1976.

to use State tax department files. This latter is a dangerous precedent, because once that first breach of confidentiality is legitimized, the legislative branch of both State and Federal governments will find it easier to create other special cases. Such legislation should not be encouraged.²⁵

The Commission concurs with this opinion and therefore recommends:

Recommendation (14):

That the Congress amend Title IV-D of the Social Security Act to provide that the provision requiring States to "utilize all sources of information and available records" [Section 454(8)] not be construed to override State and local laws prohibiting the disclosure of certain types of information unless these laws have made provision for disclosure to the State Parent Locator Service.

The Commission also objects to Section 453(e)(2) of the Social Security Act which provides that, notwithstanding any other provision of law, Federal agencies shall supply information to the Federal Parent Locator Service (PLS). The only exceptions to this provision are for disclosures to the Federal PLS that would contravene national security or the confidentiality of census data.²⁶ The Commission believes that when other provisions of law dictate that the use or disclosure of certain information be restricted, and when such provisions do not explicitly allow, by exception, for release of information to the Federal PLS, the Federal PLS should not be permitted access to that information. Furthermore, the Commission strongly believes that Federal agency information available to the PLS should be limited to the minimum necessary to aid in the location of absent parents, and should not involve additional information regarding, for example, the individual's income or assets.²⁷ Accordingly, the Commission recommends:

Recommendation (15):

That the Congress amend Section 453(e)(2) of Title IV-D of the Social Security Act to provide that Federal agencies maintaining information which, by other provisions of law, has been deemed to be confidential, shall not be required to provide that information to the Federal Parent Locator Service (PLS), unless disclosure to the Federal PLS is specifically authorized by a Federal statute that specifies the agency that may disclose information to the PLS; and

²⁵ Written statement, *Federal Tax Return Confidentiality*, Hearings before the Privacy Protection Study Commission, March 12, 1976, p.3.

²⁶ In testimony before the Commission, Office of Child Support Enforcement officials testified that, although the Federal Parent Locator Service may utilize all Federal sources of information, it currently relies primarily upon the Social Security Administration, the Internal Revenue Service, and the Department of Defense.

²⁷ See Chapter 14 for a further discussion of this topic.

further, that the Congress limit disclosures of information by Federal agencies to the PLS to the minimum necessary to locate the absent parent (e.g., place of employment and home address).

These two recommendations reflect the Commission's conviction that no law regarding the gathering of information should override all other laws regarding confidentiality. Instead, policy makers formulating laws on the disclosure of the kinds of records that the PLS would find useful should be required to decide explicitly whether the PLS should have access to each type of record. Such a decision would require legislators to weigh all of the considerations involved, including the interests at stake in child support enforcement, and would assure that child support enforcement is not automatically viewed as paramount to all other considerations.

TECHNICAL ASSISTANCE FOR THE STATES

Lacking any comprehensive Federal and State fair information practice policy, Congress and the Federal agencies have been compelled to develop policies in special areas where the absence of record-keeping policies is especially risky, most notably in the areas of alcohol and drug abuse treatment and child abuse and neglect prevention and treatment. In these two areas, Congress has enacted statutes and Federal agencies have developed regulations dealing with permissible uses and disclosure of records about individuals. The Commission's recommended measure on disclosure, *Recommendation (10)*, would supersede other Federal policies on confidentiality, except in the case of alcohol and drug abuse treatment records, and would require States to enact their own comprehensive confidentiality statutes. Although some may contend that this measure would ultimately lessen privacy protection for clients, the Commission expects that States are as sensitive as the Federal government has been to the need to control carefully the dissemination of such information.

Nevertheless, not all of the States have had extensive experience in preparing this kind of legislation. Many Federal agency employees are intimately familiar with the policy issues that arise not only in the two areas cited above, but also in other areas where sensitive records are created with the help of Federal financing. The States, particularly those for which fair information practice is a novel concept, may find this experience most useful.

Therefore, the Commission recommends:

Recommendation (16):

That the Congress require the heads of all Federal agencies funding public assistance and social services programs to provide assistance to the States in developing their fair information practice statutes.

The Commission feels that such assistance could be provided by, for example, a committee made up of representatives of all appropriate Federal agencies which would meet with State legislators and other concerned

citizens to advise them in developing the State statutes required by the recommended measures. Assistance might also take the form of grants to consortiums made up of representatives of clients' groups, State and local government agencies, and State legislatures to serve as information clearinghouses, and to draft model statutes for the States.

* * * * *

Adoption of the Commission's recommendations with respect to public assistance and social services record keeping would, in the Commission's judgment, simplify the administration of the many programs and provide a reasonable balance between the demands of effective program administration and legitimate rights and interests of clients.